

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals  
for the Second Circuit, held at the Daniel Patrick Moynihan  
United States Courthouse, 500 Pearl Street, in the City of  
New York, on the 16th day of October, two thousand seven.

PRESENT:

HON. CHESTER J. STRAUB,  
HON. SONIA SOTOMAYOR,  
HON. REENA RAGGI,

*Circuit Judges.*

SAUL BENITEZ-PENA,  
\_\_\_\_\_*Petitioner,*

v.

PETER D. KEISLER,<sup>1</sup>  
ACTING U.S. ATTORNEY GENERAL,  
*Respondent.*

05-4833-ag  
NAC

FOR PETITIONER: Saul Benitez-Pena, *pro se*, Whittier,

<sup>1</sup>Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Acting Attorney General Peter D. Keisler is automatically substituted for former Attorney General Alberto R. Gonzales as a respondent in this case.

1 California.

2  
3 **FOR RESPONDENT:** Terrance P. Flynn, United States  
4 Attorney, Western District of New  
5 York, Gail Y. Mitchell, Assistant  
6 United States Attorney, Buffalo, New  
7 York.  
8

9 UPON DUE CONSIDERATION of this petition for review of a  
10 decision of the Board of Immigration Appeals ("BIA"), it is  
11 hereby ORDERED, ADJUDGED, AND DECREED, that the petition for  
12 review is DENIED in part and DISMISSED in part.

13 Petitioner Saul Benitez-Pena, a native and citizen of  
14 Mexico, seeks review of the August 16, 2005 order of the BIA  
15 affirming the January 5, 2004 decision of Immigration Judge  
16 ("IJ") Philip J. Montante, Jr., denying his application for  
17 asylum, withholding of removal, and relief under the  
18 Convention Against Torture ("CAT"). *In re Saul Benitez-*  
19 *Pena*, No. A79 065 748 (B.I.A. Aug. 16, 2005), *aff'g* No. A79  
20 065 748 (Immig. Ct. Buffalo, Jan. 5, 2004). We assume the  
21 parties' familiarity with the underlying facts and  
22 procedural history of the case.

23 When the BIA does not expressly "adopt" the IJ's  
24 decision, but its brief opinion closely tracks the IJ's  
25 reasoning, we may consider both opinions for the sake of  
26 completeness if doing so does not affect our ultimate

1 conclusion. *Wangchuck v. DHS*, 448 F.3d 524, 528 (2d Cir.  
2 2006). We review the agency's factual findings under the  
3 substantial evidence standard. See, e.g., *Zhou Yun Zhang v.*  
4 *INS*, 386 F.3d 66, 73 & n.7 (2d Cir. 2004), *overruled in part*  
5 *on other grounds by Shi Liang Lin v. U.S. Dep't of Justice*,  
6 494 F.3d 296, 305 (2d Cir. 2007) (en banc).

7 As a preliminary matter, we lack jurisdiction to review  
8 the agency's findings with respect to the untimeliness of  
9 Benitez-Pena's asylum application. See, e.g., *Joaquin-*  
10 *Porras v. Gonzales*, 435 F.3d 172, 180 (2d Cir. 2006) (citing  
11 8 U.S.C. § 1158(a)(3)). Therefore, to the extent that he  
12 challenges the agency's denial of his asylum application, we  
13 dismiss his petition for review.

14 Regarding withholding of removal, Benitez-Pena does not  
15 argue that he will be singled out for persecution, but  
16 challenges the BIA's finding that there is no "pattern or  
17 practice of persecution of" homosexual men in Mexico.<sup>2</sup> See  
18 8 C.F.R. § 1208.16(b)(2)(i). Our review of the record  
19 evidence leads us to conclude that substantial evidence  
20 supports the BIA's finding. See *Zhou Yun Zhang*, 386 F.3d at

---

<sup>2</sup> Because the BIA assumed that "gay men [were] a cognizable particular social group," we need not examine that issue. Cf. *Manzur v. DHS*, 494 F.3d 281, 292 n.4 (2d Cir. 2007).

1 73 & n.7. While the BIA correctly observed that there are  
2 numerous disturbing incidents of violence against gay men in  
3 some areas of Mexico, the evidence does not unambiguously  
4 militate in favor of a finding that these incidents are in  
5 any way "systemic, pervasive, or organized," thus giving  
6 rise to a pattern or practice of persecution. See *Lie v.*  
7 *Ashcroft*, 396 F.3d 530, 57 (3d Cir. 2005). Indeed, no  
8 evidence in the record suggests that the Mexican government  
9 itself is engaging in the repression of homosexuals.

10 Rather, the Mexican government appears to be taking  
11 affirmative steps to combat discrimination and violence  
12 against homosexuals in Mexican society. Because the BIA's  
13 finding that there was no pattern or practice of persecution  
14 against homosexual men in Mexico was proper, Benitez-Pena  
15 failed to show the objective likelihood of persecution  
16 needed to support his claim for withholding of removal. See  
17 *Paul v. Gonzales*, 444 F.3d 148, 155-56 (2d Cir. 2006).

18 Regarding his claim for CAT relief, again, while the  
19 record evidence noted incidents of violence against  
20 homosexuals in Mexico, there is no indication that Benitez-  
21 Pena would, more likely than not, be in danger of being  
22 subjected to torture there. 8 C.F.R. §§ 1208.16(c)(2),

1 1208.17(a); *Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir.  
2 2004). Accordingly, the agency properly denied his CAT  
3 claim.

4 Finally, Benitez-Pena argues that the IJ abused his  
5 discretion and denied him due process of law when he denied  
6 his requests for: (1) a change of venue from Buffalo, New  
7 York to Los Angeles, California; and (2) a continuance when  
8 his attorney failed to appear at the merits hearing. We  
9 review the BIA's affirmance of an IJ's decision to deny a  
10 motion for a continuance or a change of venue for an abuse  
11 of discretion. See *Sanusi v. Gonzales*, 445 F.3d 193, 199  
12 (2d Cir. 2006) (continuance); *Monter v. Gonzales*, 430 F.3d  
13 546, 558 (2d Cir. 2005) (change of venue).

14 Regarding motions for a change of venue, even if an IJ  
15 abuses his discretion, "an incorrect decision . . . would  
16 entitle petitioner to a remand only if he could show that it  
17 caused him prejudice." *Monter*, 430 F.3d at 559 (internal  
18 quotation marks and alterations omitted). Based on the  
19 record here, we agree with the BIA that Benitez-Pena failed  
20 to establish that "the denial of the venue change affected  
21 either the outcome or the overall fairness of" his hearing.  
22 *Id.* (internal quotation marks omitted). For example, he

1 failed to offer any evidence to show how the testimony of  
2 his proposed witnesses would have buttressed his claims. As  
3 such, the BIA's affirmation of the IJ's denial of his change  
4 of venue motion was not an abuse of discretion.

5       Regarding the IJ's denial of his motion for a  
6 continuance, Benitez-Pena argues that the IJ abused his  
7 discretion and that the failure to grant a continuance  
8 deprived Benitez-Pena of the assistance of his counsel and  
9 thus due process of law. Because immigration proceedings  
10 are civil, not criminal, "[a]n asylum applicant . . . enjoys  
11 no specific right to counsel, but only a general right to  
12 due process of law under the Fifth Amendment of the  
13 Constitution." *Jian Yun Zheng v. U.S. Dep't of Justice*, 409  
14 F.3d 43, 46 (2d Cir. 2005). Here, regardless of whether the  
15 IJ abused his discretion in denying the continuance, the  
16 absence of Benitez-Pena's counsel did not result in a  
17 violation of due process because there is no indication that  
18 he failed to receive a "full and fair opportunity to present  
19 [his] claims." *Li Hua Lin v. U.S. Dep't of Justice*, 453  
20 F.3d 99, 104 (2d Cir. 2006) (internal quotation marks  
21 omitted). Over the course of the hearing, the IJ made a  
22 significant effort to ensure that Benitez-Pena understood

1 the nature of the proceedings, and asked him multiple times  
2 to explain himself and to provide further details about his  
3 alleged fear of persecution in Mexico. On the basis of this  
4 record, because Benitez-Pena has not demonstrated that the  
5 IJ's denial of a continuance amounted to a violation of his  
6 Fifth Amendment right to due process of law, we will not  
7 disturb the BIA's decision.

8       For the foregoing reasons, the petition for review is  
9 DENIED in part and DISMISSED in part. As we have completed  
10 our review, the pending motion for a stay of removal in this  
11 petition is DISMISSED as moot.

12 FOR THE COURT:  
13 Catherine O'Hagan Wolfe, Clerk  
14

15 By: \_\_\_\_\_